OCEAN CAPITAL BHD A

v.

SHENCOURT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: D4-22-259-1998]
27 MAY 2008

CONTRACT: *Tenancy agreement - Construction of agreement - Terms - Rescission - Uncertainty of commencement date of agreement - Breach - Refund of security deposit - Counterclaim for wrongful rescission* C

LAND LAW: *Tenancy - Construction - Terms of tenancy agreement - Rescission - Uncertainty of commencement date of agreement - Breach - Refund of security deposit - Counterclaim for wrongful rescission* D

The plaintiff sought, *inter alia*, the following orders in these proceedings: (i) a declaration that a Tenancy Agreement dated 11 November 1994 entered into between the plaintiff and defendant had been rescinded by the plaintiff *via* its solicitors' letter dated 5 September 1997 due to uncertainty of the commencement date of the Tenancy Agreement and/ or breach of the terms of the Tenancy Agreement by the defendant; and (ii) the defendant to refund to the plaintiff the security deposit of RM846,000 together with interest at the rate of 12% per annum from 12 September 1997 until full and final settlement. The defendant counter-claimed, asserting, *inter alia*, that it had suffered damages due to the plaintiff's wrongful rescission of the Tenancy Agreement. E F

Held (allowing the plaintiff's claim, and dismissing the defendant's counter-claim):

(1) From the wording in the Tenancy Agreement, the meaning appeared to be clear that the commencement date was agreed to be 1 June 1997 or a date no earlier than two months before 1 June 1997. While it gave power to change the commencement date, the power was limited to the new date not being earlier than 1 April 1997. In the event, it was not disputed that a letter dated 22 April 1997 from the defendant gave notice of change of the commencement date without setting out the date. That letter was legally ineffective. After 1 June 1997, there was plainly a breach which the plaintiff could accept or, alternatively, declare a breach and rescind the agreement. There was no evidence placed before the court that the plaintiff had accepted the delay. What was in evidence was that the matter was being studied by the plaintiff's solicitors, whose letter dated 5 September 1997 rescinded the Tenancy Agreement and demanded G H I

A the refund of the security deposit in the sum of RM846,000. If there was a letter dated 27 May 1997, as claimed by the defendant, giving notice of the commencement date being changed to 15 April 1998, that new date was clearly in any case a breach of the Tenancy Agreement, upon which the plaintiff could have rescinded
B the Tenancy Agreement and demanded the refund of the security deposit. In the light of the finding above, and since in any case the new date of 15 April 1998 was a breach, and, further, there being no evidence from the defendant of any communication from the plaintiff between five days after the posting of the letter of 27 May
C 1997 until 5 September 1997 indicating that the plaintiff accepted the delay to 15 April 1998, the defendant's counter-claim must also fail. (paras 7, 8, 9 & 10)

For the plaintiff - Tee Tai Tzian (Nor Hayati Hassan with him); M/s Teh Kim Teh, Salina & Co

D *For the defendant - Johanan Puthucheary; M/s Yusuf Khan & Fong*

Reported by Suresh Nathan

E **JUDGMENT**

Abdul Wahab Patail J:

[1] The plaintiff, Ocean Capital Berhad sought the following orders in these proceedings:

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a. A Declaration that the said tenancy agreement dated 11 November 1994 has been rescinded by plaintiff *via* its solicitor's letter dated 5 September 1997 due to uncertainty of the commencement date of the said tenancy agreement and/or breach of the terms of the said tenancy agreement by defendant;

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b. Defendant is ordered to refund to plaintiff the security deposit of RM846,000 together with interest at the rate of 12% per annum from 12 September 1997 until full and final settlement.

c. General damages for breach of contract;

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d. Cost; and

e. Any other relief as this Honourable Court deem fit and just.

[2] It was not disputed that by a tenancy agreement dated
I 11 November 1994 signed by defendant as landowner ("Landlord") and plaintiff as tenant (hereinafter referred to as "the said tenancy agreement'), the plaintiff had agreed to rent from defendant part of a

premise from the Concourse Floor to Third Floor of a commercial building that was to be constructed and known by a temporary name as Galaxy Shopping Centre, Ampang, measuring approximately 130,000 square feet (hereinafter referred to as "the said demised premise"); and at all material time, defendant as Landlord to the said demised premise knew that plaintiff rented the said demised premise to operate retail activity (supermarket cum departmental store) at the said demised premise. The purpose for rental was also explained in para. H of Schedule A of the tenancy agreement. As such, it was the intention of plaintiff and defendant to fix a commencement date that took into consideration the nature of business which was to be operated by plaintiff in the said demised premise. Pursuant to cl. 1(e) of the said tenancy agreement, the commencement date of the tenancy of the said demised premise was defined as "the date fixed or to be fixed pursuant to cl. 4 and para. (B) of the schedule A below".

[3] It was not disputed that cl. 4 of the said tenancy agreement provided that "the tenancy shall be deemed to commence on the commencement date identified pursuant to para. (B) of the schedule A below, provided always the Landlord shall be entitled to from time to time by written notice (hereinafter referred to as "the commencement notice") to the tenant alter the commencement date to such other date specified in the commencement notice, and further provided always a copy of the current commencement notice shall be notified by the landlord to the tenant.

[4] It was also not disputed that:

a. Plaintiff had paid to the defendant a sum of RM846,000 as security deposit in accordance with cl. 3.01 and para. E schedule A of the said tenancy agreement (hereinafter referred to as "the said security deposit."

b. At the month end of April 1997, plaintiff had received a letter from defendant dated 22 April 1997 informing that the commencement date for tenancy of the said demised premise which was fixed on 1 June 1997 will be postponed to another date without specifying the commencement date.

c. Plaintiff had on numerous occasions demanded refund of the security deposit from defendant but until to date the defendant still failed and/or refused to refund the said security deposit to plaintiff even though the said tenancy agreement has been purportedly rescinded by plaintiff.

[5] The following sets out the disputed facts:

a. Pursuant to para. B of schedule A of the said tenancy agreement, tenancy of the said demised premise will commence on 1 June 1997 or at "such other date to be agreed upon by the landlord and the tenant, such date being a date two months prior to the commencement date". The defendant did not dispute this "only if the commencement date was earlier than 1 June 1997".

b. Even though at a later stage the defendant claimed that a letter dated 27 May 1997 had been sent to plaintiff notifying the commencement date of the tenancy of the said demised premise was on 15 April 1998, but to date the plaintiff never received the said letter of 27 May 1997. Plaintiff thus denied receipt of the letter dated 27 May 1997 alleged to have been sent to the plaintiff. The defendant disputed the plaintiff's assertion regarding the letter dated 27 May 1997.

c. Due to the fact that the construction of the said demised premise was still in progress and the commencement date of the said tenancy has been postponed to an uncertain date, plaintiff had by its solicitor Messrs Teh Kim Teh Salina & Co.'s letter dated 5 September 1997 rescinded the said tenancy agreement because the defendant had breached the terms of the said tenancy agreement caused by defendant's failure to make available the said demised premise on or before 1 June 1997. The defendant disputed that it breached the tenancy agreement.

d. In furtherance and/or in the alternative, the commencement date of the said tenancy was open at large without any certainty by defendant's letter dated 22 April 1997. Therefore, plaintiff was entitled to the refund of the security deposit of RM846,000 from the defendant. The defendant submitted the plaintiff was not entitled to a refund of the deposit.

[6] The defendant had counter-claimed and asserted:

a. That during the defendant's construction works on the Galaxy Ampang Centre, Ampang, up until 5 September 1997, the defendant had commenced and substantially completed the design and construction of the aforesaid project in accordance with the specific requirements of the plaintiff as originally requested and agreed upon by the plaintiff.

b. Due to the plaintiff's breach of contract and wrongful rescission of the said tenancy agreement, the defendant will have to find a new anchor tenant(s) and/or other tenant(s) and that will delay the opening of the said Galaxy Shopping Centre, Ampang, in general and of the said premises in particular.

c. Under the said tenancy agreement the said premises to be tenanted by the plaintiff was measured by both parties and calculated to be 126,147.47 square feet. The agreed rental rate was RM2.35 per square foot per month for an initial period of three years. The defendant had therefore suffered a loss of rental of: 126,147.47 square feet x RM3.25 per square foot x 36 months = RM10,672,075.96.

d. Further, that due to the plaintiff's wrongful actions and breach of contract, the plaintiff had caused the defendant to suffer long delays in the defendant's construction works and the defendant's completion and subsequent opening of the said Galaxy Shopping Centre, Ampang. Because of the aforesaid wrongful action by the plaintiff, the defendant cannot open the said Galaxy Shopping Centre, Ampang, by 15 April 1998. The tentative date of opening the said Galaxy Shopping Centre, Ampang, was now fixed for 31 December 1998.

e. The defendant particularised and quantified the delays and costs, and its loss and damages, costs and expenses.

f. The defendant averred that due to the plaintiff's breach of contract, the defendant had suffered general damages arising from the defendant's loss of an anchor tenant for the defendant's Galaxy Shopping Centre, Ampang. Such general damages would have to be further assessed by the court at the full hearing of this matter.

[7] Clause 4 read together with para. B of sch. 4 provided that the commencement date was 1 June 1997, or such other date to be agreed between the parties, such date being a date two months prior to the commencement date. The drafting or the standard of English could be better, but the meaning appears to be clear on the wording in the tenancy agreement that the commencement date was agreed to be 1 June 1997 or a date not earlier than two months before 1 June 1997. While it gave power to change the commencement date, the power was limited to the new date being not earlier than 1 April 1997. In the event, it is not disputed the defendant's letter dated 22 April 1997 gave notice of change of commencement date without setting out the date.

[8] It is provided by cl. 16.03 of the tenancy agreement as to notice that:

> Any and all notices and/or demands required to be issued or served pursuant to this Agreement unless specifically specified otherwise, shall be in writing and sent to the relevant party by posting or by hand to the relevant addresses herein contained. Where the service is effected by posting, the notice and/or demand shall be deemed to be properly served within 5 days of posting. Provided always that where the Tenant is a company, service effected personally on the secretary or any one of the directors or on the company at its registered address shall be deemed good service.

[9] The letter of 22 April 1997 giving notice without specifying any date is legally ineffective. After 1 June 1997, there was plainly a breach which the plaintiff could accept or alternatively declare a breach and to rescind the agreement. There is no evidence placed before the court that the plaintiff had accepted the delay. What is in evidence is that the matter was being studied by the plaintiff's solicitors, whose letter dated 5 September 1997 rescinded the tenancy agreement and demanded the refund of the security deposit in the sum of RM846,000.

[10] If there was a letter dated 27 May 1997, as claimed by the defendant, giving notice of commencement date to 15 April 1998, that new date was clearly in any case a breach of the tenancy agreement, upon which the plaintiff could have rescinded the tenancy agreement and demanded the refund of the security deposit. In the light of the finding above, and since in any case the new date of 15 April 1998 was a breach, and further there being no evidence from the defendant of any communication from the plaintiff between five days after posting of the letter of 27 May 1997 and until 5 September 1997 that indicates the plaintiff accepted the delay to 15 April 1998, the defendant's counter-claim must also fail.

[11] In the event, judgment was entered for the plaintiff with costs, and damages to be assessed; and the defendant's counter-claim was dismissed with costs.